Filed 8/26/19 Huete v. J.K. Residential Services CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

| | |
|---|---|
| JAIME HUETE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>J.K. RESIDENTIAL SERVICES, INC. et al.<br><br>Defendants and Appellants. | B288259<br><br>(Los Angeles County Super. Ct. No. BC619430) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Affirmed.

The Cameron Law Firm, and Parry G. Cameron for Plaintiff and Respondent.

Law Offices of Leon Small and Leon Small for Defendants and Appellants.

---

Contractor Jaime Huete sued J.K. Residential Services, Inc. (JKRSI) and the entity-owners of six rental properties[1] for breach of contract, alleging they failed to pay for work done on the properties. Defendants cross-claimed against Huete on the same contracts. The trial court found in favor of Huete after a one-day bench trial and awarded Huete damages totaling $95,211.63. Defendants appeal, contending insufficient evidence supports the damages award and the trial court committed evidentiary error. We affirm.

**FACTS**

JKRSI is the property manager for the six properties at issue. Huete is a general contractor doing business as J.H. General Contractor. Between December 2015 and January 2016, Huete, as J.H. General Contractor, entered into various contracts with the entity-owners to perform work at the six properties.[2]

---

[1] Because all the appellants/defendants are acting in concert in this appeal, we refer to them collectively as Defendants. Defendants in this matter are JKRSI, 3410-3418 Drew Street, LLC (Glen Terrace), 15234 Sunburst Street, LLC (Sun Pointe), View Pointe Leeward, LLC (View Pointe), Royal Garden Apartments, Inc. (Royal Garden), 1583-1629 Fair Oaks Avenue, LLC (Fair Oaks Pointe), and 147 E. Avenue 43, LLC (Highland Meadows). To conform to the parties' briefs, we refer to the name of the property, given in parentheses, rather than the name of the entity that owns it.

[2] JKRSI asserts it was not a party to any of the underlying contracts and thus, liability should not have attached to it. It acknowledges it is raising this issue for the first time on appeal. We have discretion to consider an issue not raised below if it involves only a legal question "determinable from facts which not only are uncontroverted in the record, but which could not be

Rubin Aghazaryan, JKRSI's vendor relations officer, negotiated the contracts with Huete's foreman, who oversaw the projects and signed the contracts on behalf of Huete. The contracts were exemplars used by JKRSI and each required the owner of the property to pay a deposit of 30 to 50 percent of the estimated total cost with the balance due upon completion.

When JKRSI notified Huete it was terminating all the contracts and refused to pay him the balance on any of them, Huete recorded mechanics liens against the properties and filed suit against Defendants for breach of contract. Defendants cross-claimed against Huete, alleging he failed to timely and adequately complete the projects.

Huete and Aghazaryan testified in a one-day bench trial. Huete explained the scope of each project, how much he was paid, and how much he was owed. Huete also testified to the level of completion shown in before and after photographs of the projects, which were admitted into evidence. Aghazaryan testified the projects were not timely completed and there were workmanship issues associated with each. He acknowledged two of the projects, Sunburst and Viewpoint, were complete, but testified

---

altered by the presentation of additional evidence." (*In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 511.) Based on the record before us, we cannot conclude this presents a purely legal question. Liability may attach, for example, based on an alter ego theory. The evidence, however, does not demonstrate the relationships among the Defendants or between JKRSI and Huete. Because JKRSI never asserted this argument below, it was unnecessary for Huete to argue an alter ego theory or some other theory of liability as to JKRSI. We thus decline to consider this never-before-raised issue.

Huete's foreman agreed to resolve the issues involving the uncompleted projects before any payment could be made as to the completed ones.

The trial court found in favor of Huete, ordering the properties sold pursuant to the mechanic's liens. It awarded Huete $95,211.63 in total damages after deducting $2,000 for a project for 2339 Lincoln Park Avenue, LLC that Huete never started. The court found, "Defendants saw an opportunity to essentially avoid having to pay. [¶] And it was a significant amount of money that was due $97,211.63. I'm not going to go through each and every project. I think the evidence is very clear on what the completion was." The trial court disbelieved Defendants' argument that the work was not completed, finding "it was truly apparent from the photos that it would be really unfair to Mr. Huete" to credit Defendants' position. The court further found Defendants terminated Huete without providing him written notice of what terms he breached, as required under the contracts.

Defendants filed a motion for new trial, which was denied. Defendants timely appealed.

## DISCUSSION

### I. Substantial Evidence Supports the Damages Award

Defendants argue they are entitled either to a new trial on damages or reduced damages. They contend insufficient evidence supports the damages award as to the two contracts for Glen Terrace because the evidence showed those projects were not completed on time or according to the standards prescribed in the contracts. Defendants also contest any liability for additional services provided for the Highland Meadows, Sun Pointe, and

Fair Oaks Pointe projects because those contracts required any additional work to be approved in writing.[3]

The trial court did not abuse its discretion when it denied the motion for new trial because substantial evidence supports the damages award. In addition, we decline to reverse the damages award on the ground it is excessive.

**A. Standard of Review**

Both trial and appellate courts have the power and duty to reduce excessive damages awards. (*Beagle v. Vasold* (1966) 65 Cal.2d 166, 178.) Code of Civil Procedure section 657, subd. (5), permits the trial court to modify or vacate a verdict and order a new trial because excessive or inadequate damages were awarded. However, section 657 specifies, "[a] new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657.)

On appeal, we will not disturb the trial court's denial of a motion for new trial unless the court has abused its discretion. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160–1161.) Because the trial judge has witnessed the testimony and applies a more exacting standard of review, weighing the evidence and resolving issues of credibility independently to determine whether the award is against the weight of the

---

[3] There is no dispute that the work was completed for Sun Pointe and View Pointe. Defendants also do not claim the damages awarded for those projects were excessive.

evidence, his or her ruling is entitled to great weight. (*Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 414, fn. 28.) Accordingly, "[t]he trial judge's determination on a motion for a new trial on the issue of excessive damages is usually upheld." (*Id*. at p. 414.)

Further, an appellate court is required to act only when a damages award, as a matter of law, appears excessive or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice. (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1213; *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 16.)

**B. Glen Terrace**

**1. The Two Projects**

Huete entered into two contracts in connection with the Glen Terrace property: one dated January 21, 2016, to build two retaining walls (Retaining Wall Contract) and a second dated January 22, 2016, to construct two parking lots (Parking Lot Contract). Both projects contained a payment schedule under which Huete would be paid 30 percent of the total cost to initiate the project, another 30 percent upon completion of an initial phase (i.e., completion of the first retaining wall or parking lot), and the remaining balance upon project completion and verification. The projects were estimated to be completed in two weeks, but the contracts did not specify a start date or contain a time of the essence clause. Huete received the initial deposit for both projects, but was paid nothing thereafter.

The contracts specified that "Glen Terrace may immediately, at its option, terminate this Agreement in the event of a breach by Contractor. Such termination may be effected only

through a written notice to the breaching party (fax transmission acceptable), specifically identifying the breach or breaches on which such notice of termination is based." Huete was terminated from all projects by identical letters dated February 19, 2016. The letters did not identify the breach which precipitated the termination, but instructed Huete to cease all work and return any deposited sums.

The Retaining Wall Contract involved demolition of the existing walls and construction of two new six-foot high retaining walls. The total contracted amount was $52,000. The Parking Lot Contract required Huete to demolish the two existing concrete parking lots at Glen Terrace and construct new ones. The Parking Lot Contract estimated a total payment of $60,000, with the final "approved price" to be calculated at $5.43 per square foot.

Huete testified both retaining walls were 90 to 95 percent complete when he was terminated, explaining he only needed "to finish up with six blocks, and also fill it up with grout." He estimated he needed another day to complete both walls. Huete also testified he had completed approximately 10 percent of the demolition for the parking lot project at that time. He had been unable to start the project on time because JKRSI failed to notify the tenants to move their cars. He maintained he was prepared to complete both the retaining wall and parking lot projects. During his testimony, photographs showing the existing retaining walls and parking lots, the demolition, the progress made, and the almost-complete walls were admitted into evidence.

Aghazaryan testified that, as of the February 19, 2016 termination date, the retaining walls were only approximately

two feet in height instead of the six feet required under the Retaining Wall Contract. He also testified Huete had just "started the demolition work" and performed "very minimal" work on the parking lots. Aghazaryan explained that time was of the essence in completing the Glen Terrace projects due to tenant parking displacement and a pending refinance of the property. In addition, he complained Huete failed to maintain a safe job site and left scattered debris onsite. After termination, Glen Terrace was obligated to hire a different contractor to complete the parking lot work for a total of $80,000, which was $20,000 more than what was called for in the Parking Lot Contract.

The trial court found in favor of Huete and awarded him $38,050 in total damages as to the Glen Terrace contracts.

**2. The Doctrine of Substantial Performance Applies to the Retaining Wall Contract**

Defendants contend Huete breached the contract because the retaining walls were not timely completed. Specifically, they contend the retaining walls should have been completed by February 8, 2016, because the deposit check was given to Huete on January 25, 2016. The trial court concluded otherwise, and we agree.

The Retaining Wall Contract specified an "approximate" completion in two weeks. The evidence showed that the retaining walls were 90 to 95 percent complete by February 19, the date of the termination letter. After that date, Defendants made completion impossible by instructing Huete to cease all work on the project, refusing to pay, and demanding return of the deposit. Given this evidence, the trial court did not abuse its discretion when it denied Defendants' motion for new trial for excessive damages as to the Retaining Wall Contract. For the same

reason, there is no support for Defendants' argument that the award was the result of passion and prejudice.

Our determination is supported by the California Supreme Court's decision in *Lowy v. United Pacific Ins. Co.* (1967) 67 Cal.2d 87, 92. There, the contractor had completed 98 percent of the contracted excavation and grading work, but was prevented by the developers from completing the project. When the developers demanded an additional bond from the contractor and refused to pay the contractor's previously approved invoice, the contractor ceased work. The Supreme Court found substantial evidence to support the trial court's finding that the developers breached the contract and made full performance impossible. Thus, the contractor was entitled to recover the balance of the contract price, less the two percent allowed as damages for the failure of strict performance. (*Id.* at pp. 92–93.) The court also denied the developers' request for an offset to the damages award for additional sums they expended to have a different contractor finish the project. (*Id.* at p. 94.)

Like the contractor in *Lowy*, Huete is entitled to recover on the Retaining Wall Contract under the doctrine of substantial performance and the trial court did not abuse its discretion when it denied the new trial motion.

**3. Huete Was Excused From Performing Under the Parking Lot Contract**

Defendants assert Huete breached the Parking Lot Contract because he had only completed 10 percent or less of the project at the time of termination. Defendants claim there was thus no evidence supporting any damages against them on this project, and any award for the project demonstrated the trial court was prejudiced against them. Defendants urge reversal or

reduction of the damages award for the Parking Lot Contract. We are not persuaded.

Whether Huete breached the Parking Lot Contract by the termination date was an issue of fact for the trial court to decide. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277 (*Brown*).) Thus, the trial court's factual finding is upheld if based on substantial evidence. (*Id.* at p. 279.) " ' "[I]n examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the findings as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion." ' [Citation.] Factual matters will be viewed most favorably to the prevailing party. [Citation.] Conflicts in the evidence will be decided in favor of the prevailing party. [Citation.]" (*Hilliard, supra,* 148 Cal.App.3d at p. 406.)

It is well established that performance under a contract is excused when such performance is prevented or delayed by the act of the other party. (Civil Code, § 1511, subd. (1); see *Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 296.) Likewise, "[i]f the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties." (Civil Code, § 1512.) Under these principles, if one party's conduct prevents or delays timely performance of a condition by the other party, the condition of timely performance may be excused. (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1342–1343; *Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1130–1132; *Erich v. Granoff* (1980) 109 Cal.App.3d 920, 930.)

Here, the trial court found there was no breach by Huete because the time specified in the Parking Lot Contract was only an approximate time of completion. It concluded any delays were "minimal" or "within the time frame dependent upon when the check was given." Further, it found Huete was excused from completing the project due to Defendants' conduct.

We find substantial evidence supports these findings. Huete testified the start of the project was delayed due to JKRSI's failure to instruct its tenants to park elsewhere. Also, the purported completion date was uncertain because there was no specified start date in the contract and it was unclear when a deposit was given to Huete. Additionally, the contract did not indicate that time was of the essence. Huete testified he was prepared to complete the project, but was prevented from doing so by Defendants, who demanded he cease all work, refused to pay for other work that had been done, and demanded return of the deposits. It was Defendants who breached the contract by terminating Huete without any explanation as to what conduct caused the termination.

We also reject Defendants' contention that they are entitled to an offset for the $20,000 more they paid the other contractor to finish the parking lots. The trial court found Huete's failure to finish the project was due to Defendants' actions. They are not entitled to an offset under such circumstances. (See *Pacific Venture Corporation v. Huey* (1940) 15 Cal.2d 711, 717.)

**C. Highland Meadows, Sun Pointe, and Fair Oaks Pointe**

Defendants next complain the trial court improperly awarded $6,421 in damages to Huete for additional work he performed on Highland Meadows ($1,500), Sun Pointe ($2,756),

and Fair Oaks Pointe ($2,164), contending Huete was required to, but did not, receive written authorization for the work. We disagree.

Here, we again review the trial court's finding for substantial evidence. (*Brown, supra,* 192 Cal.App.4th at p. 277.) Substantial evidence shows Defendants waived the written authorization requirement for change orders by their conduct. (*Spellman v. Dixon* (1967) 256 Cal.App.2d 1, 4 ["a contracting party may waive provisions placed in a contract solely for his benefit"].)

The contracts for each of these three projects warned that Defendants "will not pay for any services rendered or materials ordered without a Purchase Order Number being furnished on the invoice for said services or materials. If the amount of the work to be performed is more [than] $500.00 then the Contractor must get a written approved contract signed by Senior Management (Anil Mehta or Jeet Jogani). Any extra work requested to be done by the Manager or Maintenance Employee, in addition to the work originally requested under the original Purchase Order, must be approved by means of a new Purchase Order. It is most important that we control any work being contracted for by means of separate Purchase Orders. [Emphasis original.]"

Huete acknowledged at trial that he did not get written approval for the extra work, but testified the work was orally requested by Defendants and necessary. Huete testified Aghazaryan himself made a different oral change to the scope of work for the Royal Garden contract, which Defendants accepted, and do not contend was required to be in writing. That change resulted in an approximate $16,000 reduction in the total cost of

the projects.[4] Moreover, the contracts for the projects contemplated additional work because the contracts estimated the square footage of work to be done, and specified a per square foot charge in the event more or less work was actually done. The Sun Pointe and Fair Oaks Pointe contracts, for example, provided for a total price that was based on the "approx. roof size," but specified a per square foot price that would determine "the final amount [which] will be based on the actual work completed at the property." We also note that Defendants never rejected the additional work or complained about it before the project was completed.

Thus, the trial court did not abuse its discretion when it denied Defendants' new trial motion for excessive damages as to these projects. Neither does the record disclose the trial court exhibited passion or prejudice against Defendants in its damages award.

## II. The Trial Court Did Not Abuse Its Discretion When It Excluded Portions of Aghazaryan's Testimony

At trial, defense counsel asked Aghazaryan whether he told Huete's foreman the reasons for terminating the contracts. Aghazaryan responded he had, but the trial court sustained a hearsay objection to any further testimony on the subject. The trial court later determined the testimony also violated the parole evidence rule when it ruled on Defendants' motion for new trial. Defendants claim the testimony was not hearsay because it was

---

[4] In a footnote, Defendants argue, without citation to the record or the law, that Huete breached the Royal Garden contract, which should have resulted in a further $10,700 offset to the total damages award. We reject the argument as summarily as Defendants made it.

not offered for the truth of the matter asserted and contend the statement did not violate the parole evidence rule. We find no error.

In reaching our conclusion, we need not entertain a lengthy discussion of the hearsay or parole evidence rules because the evidence was simply irrelevant. (Evid. Code, § 350.) At issue was whether Defendants breached the terms of the various contracts by failing to provide "written notice to the breaching party (fax transmission acceptable), specifically identifying the breach or breaches on which such notice of termination is based." It is undisputed Defendants gave no written notice of Huete's purported breach as required by the contracts. Defendants assert that oral notice was sufficient, but provide no explanation as to how or why they may be excused from fulfilling the condition that the notice be in writing. We find no evidence to demonstrate excuse. Thus, Aghazaryan's testimony regarding oral notice is irrelevant to show whether written notice of the reasons for Huete's termination was given and the trial court did not abuse its discretion when it excluded that portion of Aghazaryan's testimony.

**DISPOSITION**

The judgment is affirmed. Huete may recover his costs on appeal.

BIGELOW, P. J.

We concur:

GRIMES, J. WILEY, J.